Petition

81-408

No.

Office-Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1981

NATIONAL FIDELITY LIFE INSURANCE COMPANY and AVIATION INSURANCE AGENCY, INC.,

Petitioners

v.

ROGER MATTES, Executor of the Estate of VINCENT M. KERRIGAN,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Absent ambiguity in the insurance policy, does not the application by the courts below of the Pennsylvania "Hionis Rule" conflict with applicable decisions of this Court?

Absent ambiguity in the insurance policy, does not the application by the courts below of the Pennsylvania "Hionis Rule" conflict with decisions of other courts of appeal on the same subject matter?

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DESIGNATION OF CORPORATE RELATIONSHIPS

In accordance with the provisions of this Court's Rule 28.1, petitioners designate the following relationships:

(a) National Fidelity Life Insurance Company is a wholly-owned subsidiary of ERC Corporation which in turn is owned by Getty; and

(b) Aviation Insurance Agency, Inc. is not publicly owned but is the corporate parent of Ontario Reinsurance Co., Ltd., Bermuda, Air Fleet Leasing Corporation, Gainesville, Florida, and Atlanta Insurance Company, Ltd., Bermuda.

OPINION BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania (App., R. 49a-64a) is reported at 506 F. Supp. 955 (M.D., Pa., 1980). The United States Court of Appeals for the Third Circuit affirmed the decision of the District Court without opinion.

JURISDICTION

The opinion of the United States District for the Middle District of Pennsylvania was entered on October 2, 1980. The judgment order of the United States Court of Appeals for the Third Circuit was entered on May 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 10 of the Constitution of the United States provides in pertinent part as follows:

> "No state shall . . . pass any . . . Law impairing the Obligation of contracts. . ."

STATEMENT OF THE CASE

This action was commenced in the District Court for the Middle District of Pennsylvania when plaintiff, Executor of a deceased insured, on July 13, 1979, filed a complaint claiming that certain benefits provided by a disability insurance policy were due and owing to the estate by defendant insurers.

Defendants filed a motion for summary judgment on January 29, 1980, and on February 11, 1980, plaintiff moved for summary judgment in his favor. By memorandum and order entered April 16, 1980, the District Court, citing *Hionis v. Northern Mutual Insurance Company*, 230 Pa. Superior Ct. 511, 327 A.2d 363 (1974), for the proposition that, even where a policy of insurance is written in unambiguous terms, an exclusion or limitation appearing therein will not be enforced in the absence of an affirmative showing that the insured was aware of the exclusion or limitation and that the effect thereof was explained to him, directed the parties to provide answers to the following questions through supplemental briefs and, if necessary, documentary evidence:

> (1) Does the *Hionis* rule apply to this case?
>
> (2) If so, is there evidence that Mr. Kerrigan was aware of the limitation that the defendants are seeking to assert and that its effect was explained to him? (R. 28a-29a)

Petitioners herein on April 30, 1980, filed their supplemental memorandum in response to the Court order of April 16, 1980, advising that there had been no person-

to-person contact between either of the defendants and plaintiff's decedent prior to the issuance to him of a certificate of group insurance, explaining that all transactions between the defendants and him were either by mail or by telephone, and attaching copies of the January, 1974, Aviation Medical Bulletin in which an advertisement (R. 40a) and a business reply card and envelope (R. 41a, 42a) appeared which plaintiff's decedent filled out and returned to defendants' representatives (R. 43a). The avertisement (R. 40a) contained a reference to a "specified waiting period" and the information forwarded to plaintiff's decedent by way of reply to his request therefor (R. 44a) advised that the plan in question provided for the payment of "the principal amount in one tax-free lump sum—after a 12-month waiting period—if you're permanently prevented from flying for your airline for medical reasons that occur after you take out the policy..."

The plaintiffs likewise filed a supplemental brief in response to the Court order of April 6, 1980, whereupon the District Court, while expressly finding that the language of the clauses relied upon by the defendants was clear and unambiguous (R. 53a), nevertheless granted plaintiff's motion for summary judgment after concluding that there was no showing by the defendants that they or either of them had explained the terms of the policy's limitation to plaintiff's decedent, thereby compelling a conclusion "that the exculpatory clause cited by the insurance companies cannot be given effect and the plaintiff must be awarded summary judgment" (R. 61a).

The policy conditions which the District Court refused to enforce are conditions 1 and 6 (R. 8a, 9a) and provide that an airline pilot will be considered perma-

nently prevented from carrying on his occupation only if, after 12 months of continuous and uninterrupted medical suspension from flight status, it is determined that he is permanently prevented from returning to his duties as an airline pilot and that no claim shall be payable by reason of the death of the insured.

The date of the onset of plaintiff's decedent's disability was on or about December 31, 1978. The decedent died on March 9, 1979, less than 12 months from the onset of his sickness and/or disability.

Defendants filed a notice of appeal therefrom to the United States Court of Appeals for the Third Circuit which by judgment order entered May 20, 1981, affirmed the order of the District Court.

The basis for federal jurisdiction in the court of first instance is as follows: Respondent brought suit in the District Court for the Middle District of Pennsylvania on July 13, 1979, pursuant to 28 U.S.C. Sec. 1332. Subject matter jurisdiction was based on diversity of citizenship. The respondent is a resident of the Commonwealth of Pennsylvania; petitioner, National Fidelity Life Insurance Co. is a corporate citizen of the State of Iowa, having been incorporated therein, and petitioner, Aviation Insurance Agency is a corporate citizen of the State of Georgia. The amount involved, exclusive of interest and costs, is $75,000.00, which is in excess of the $10,000.00 jurisdictional requirement of 28 U.S.C. 1332.

Jurisdiction in the United States Court of Appeals for the Third Circuit was based on 28 U.S.C. Sec. 1291, to wit: an appeal from a final judgment rendered by the District Court in favor of respondent and against petitioners herein.

ARGUMENT

The Application Below of the Pennsylvania Hionis Rule to a Contract of Insurance Which Was Expressly Found To Be Unambiguous Puts the Court of Appeals for the Third Circuit in Conflict With Applicable Decisions of This Court

The District Court dealt with the question of alleged ambiguity of the conditions relied upon by petitioners under a separate heading (R. 53a). It specifically found that condition 6 could not be viewed as ambiguous. It held a provision stating that death of the insured will not, by itself, qualify for protection under the policy to be clear. It concluded that there was but one logical interpretation of condition 6, i.e., that the insured must survive the onset of the disability for a year. The District Court judge stated that any other construction would torture the meaning of the relevant language in contravention of Pennsylvania law (R. 53a).

It is undisputed in this case that plaintiff's decedent did not survive the onset of his disability for a year (Request for Admission, No. 4, R. 19a). Yet, citing *Collister v. Nationwide Life Insurance Company*, 479 Pa. 579, 388 A.2d 1346 (1978), the District Court judge stated that "the Pennsylvania Supreme Court has held that in certain circumstances even the clearest of exculpatory clauses must bet set aside" (R. 54a). In recognition of insurance contracts as contracts of adhesion, the District Court stated, the *Hionis* principle was developed in Pennsylvania, creating an affirmative duty on the insurer's part to explain

the terms of any exclusions in the scope of coverage, failure to comply with which results in a denial to an insurance company of the right to rely on an exculpatory clause. The District Court then proceeded to an examination of the opinion by the Superior Court of Pennsylvania in *Hionis v. Northern Mutual Insurance Company*, supra, and quoted therefrom the following passage, emphasizing that the insurer's burden to establish that the insured was aware of the exclusion or limitation relied upon and that the effect thereof was explained to him exists even where the policy is written in unambiguous terms. The particular passage in which this language appears was said by the District Court judge to constitute "the true importance of *Hionis*." It reads:

> "When a defense is based on an exception or exclusion in a policy, our Supreme Court has held that such a defense is an affirmative one and the burden is upon the defendant to establish it. *Even where a policy is written in unambiguous terms, the burden of establishing the applicability of the exclusion or limitation involves proof that the insured was aware of the exclusion or limitation and that the effect thereof was explained to him.* [Footnote omitted, emphasis added.]"

Finally, the District Court noted that the Court of Appeals for the Third Circuit had accepted *Hionis* as "an authoritative explanation of Pennsylvania law." Finding none of the exceptions to the *Hionis* principle applicable to the case at bar, the Federal District Court, finding that petitioners had not shown that they or any one acting on their behalf had explained the exclusion or limitation to Mr. Kerrigan and finding that there was no showing that

the insured was aware of the exclusion or limitation, entered judgment in favor of respondent and against petitioners in the amount of Seventy-five Thousand ($75,000.00) Dollars (R. 63a).

Petitioners respectfully submit that when the Court of Appeals for the Third Circuit affirmed by judgment-order it placed itself in a position of conflict with applicable decisions of this Court.

In *Imperial Fire Ins. Co. v. Coos County*, 151 U.S. 452, 14 S.Ct. 379, 38 L.Ed. 231 (1893), Mr. Justice Jackson, speaking for the Court, one justice dissenting, stated with specific reference to insurance contracts (pp. 462-463):

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the insured with the terms of the contract is a condition precedent to the right of recovery. If

the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which the contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made.

"It is settled, as laid down by this Court in Thompson v. Phenix Ins. Co., 136 U.S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

Again speaking specifically of contracts of insurance, this Court in *Bergholm v. Peoria Life Ins. Co. of Peoria, Ill.*, 284 U.S. 489, 52 S.Ct. 230, 76 L.Ed. 416, said:

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. . . As long ago pointed out by this court, the condition in a policy of life insurance that the policy shall cease if the stipulated premiums shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief. . . And to discharge the insured from the legal consequences of failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long settled principles."

It is submitted that, because it is recognized that some contracts of insurance (in particular, contracts between an insurance company, on one hand, and an individual, on the other as distinguished from contracts of group insurance, as in the case at bar, where the policyholder is an association or group, not an individual) are contracts of adhesion, their ambiguous terms are to be construed in a manner favorable to the insured; yet, where their terms and conditions are clear and unambiguous, they, like other contracts, must be construed according to their plain meaning.

The instant case is not one wherein a court, confronted with ambiguous language appearing in an insurance policy, declared it to be a contract of adhesion and resolved the ambiguity in favor of the insured. The case, rather, is one where the court, confronted with a policy

the terms and conditions of which were clear and unambiguous, held it to be a contract of adhesion and refused to accord any legal force and effect to the clear and unambiguous provisions of the policy requiring that the certificate holder survive for one year the onset of his sickness and/or disability. In short, the courts below refused to give judicial recognition to the terms and conditions of a contract of insurance, notwithstanding their declaring the said terms and conditions to have been clear and unambiguous.

Perhaps the substantiality of the question involved is best phrased in the language of Circuit Judge Aldisert, of the court below, in an opinion referred to and, indeed, relied upon by the Federal District Court in this case in *Brokers Title Company, Inc. v. St. Paul Fire & Marine Insurance Company*, 610 F.2d 1174, 1179 (3d Cir., 1979), wherein he refers to contract as "the indispensable tool in the operation of a free enterprise society."

The Application Below of the Pennsylvania Hionis Rule to a Contract of Insurance Which Was Expressly Found To Be Unambiguous Places the Court of Appeals for the Third Circuit in a Position of Conflict with Decisions of Other Federal Courts of Appeals on the Same Matter

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Several of the United States Courts of Appeals have held that while ambiguities in insurance policies are to be construed liberally in favor of the insured, unambiguous provisions contained in insurance policies, including exceptions and exclusions, should be enforced.

Argument

In *Trinity Universal Ins. Co. v. Cincinnati Ins. Co.*, 513 F.2d 915 (6th Cir., 1975), the Court stated (p. 918):

> ". . . Since under Ohio law an insurance policy subject to different interpretations will be given that interpretation most favorable to the insured, especially in the case of exclusions and exceptions from coverage, it is urged by Cincinnati that the Trinity General policy should be construed as covering Mrs. Chittum.
>
> *"This rule of construction does not become applicable until an ambiguity is found in the policy* which makes it susceptible of conflicting interpretations which cannot reasonably be reconciled. . . . The District Court was not able to find any such ambiguity in the provisions of the Trinity policy." (Emphasis added.)

In *Omaha Paper Stock Co. v. Harbor Ins. Co.*, 596 F.2d 283 (8th Cir., 1979), the Court said (p. 287):

> ". . . While an ambiguous contract is to be interpreted in favor of the insured, should the ambiguity allow such an interpretation, '[c]onstruction ought not to be employed to make a plain agreement ambiguous,' in order to construe it against the insurer. . . *Thus, limitations and exceptions in regard to liability of the insurer, if plainly expressed, should be enforced* . . . And finally, an insurance contract should be read and 'given effect according to the ordinary sense of the terms used' just as any other contract. . ." (Emphasis added.)

In *Johnson v. United States Fire Ins. Co.*, 586 F.2d 1291 (8th Cir., 1978), the Court said (p. 1295):

Argument

"We do not overlook the argument made by appellants Johnson and Industrial that courts are to construe an insurance policy liberally in favor of the insured and strictly against the insurer, resolving any ambiguity in the policy to the advantage of the insured. Nevertheless, this rule of construction is not without limit:

"[T]his rule does not justify abandoning principles of normal interpretation where the contract is clear or taking such a construction as would vary the true meaning of the contract and the intention of the parties.

". . . Nor can the doctrine of liberal construction be invoked in order to permit a strained or loose interpretation of the policy provisions so as to raise ambiguity in the contract which does not exist, or to raise a liability clearly not contemplated by the policy terms, the court having no authority, under the guise of liberal construction, to make a new contract for the parties containing provisions upon which they had not agreed. . . . The court is unwarranted in using any guide other than the common and ordinary meanings of the words employed in making its determination of liability or non-liability under the liberal construction rule, and taking a strained or unwarranted interpretation of the words employed in order to raise an ambiguity would be unjustified. The doctrine of liberality does not operate to deprive such terms of their ordinary significance. (footnotes omitted).

"13 J. Appleman, Insurance Law and Practice, §7402 (1976). *See also* 11 G. Couch, Insurance §44:7 (2d ed. 1963)."

Argument

In *Ideal Mut. Ins. Co. v. C. D. I. Const. Inc.*, 640 F.2d 654 (5th Cir., 1981), the Court noted (pp. 657-658):

> ". . . Under Florida law, which applies to issues of policy construction, the basic rule is: Where there is ambiguity such that two (or more) reasonable interpretations can fairly be made, the Court will choose that interpretation favoring the insured . . . The same rule applies to conflicting provisions. . . *However, where the terms are clear and unambiguous or only one logical interpretation consistent with the intent of the parties exists, the Court must give the policy that meaning.* . . In other words, disputes are to be resolved in favor of the insured '[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction. . . . [Such rule] does not allow courts to rewrite [insurance] contracts, add meaning that is not present, or otherwise reach results contrary to the intention of the parties.' . . ." (Emphasis added.)

The Pennsylvania rule that an insurer who would rely on an exception, exclusion or limitation in its policy of insurance must first establish that the insured was aware of the same and that its provisions were explained to him cannot be justified where the provisions relied on are clear and unambiguous. That which is clear and unambiguous requires no explanation. The burden to explain ambiguities can be justified. The burden to explain what is already clear and unambiguous cannot be justified on any grounds of state policy.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix

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No.

In the Supreme Court of the United States

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NATIONAL FIDELITY LIFE INSURANCE COMPANY and AVIATION INSURANCE AGENCY, INC.,

Petitioners

v.

ROGER MATTES, Executor of the Estate of VINCENT M. KERRIGAN,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 79-902

ROGERS MATTES, Executor of the Estate of Vincent M. Kerrigan,

Plaintiff

v.

NATIONAL FIDELITY LIFE INSURANCE COMPANY and AVIATION INSURANCE AGENCY,

Defendants

(Filed Scranton, Pa. Oct 2 1980 Donald R. Berry, Clerk Per R.M. Deputy Clerk)

MEMORANDUM AND ORDER

I. FACTS

This case concerns the liability of two insurance companies under an occupational "Disability Plan." Plaintiff Roger Mattes, Esq., is the executor for the estate of Vincent M. Kerrigan, a deceased Pan American Airlines pilot. The complainant claims the right to recover $75,000.00, the proceeds from an insurance policy that the decedent purchased from the defendants in 1974. Accord-

ing to the companies, liability is precluded by an exclusion[1] contained in the terms of the agreement. Both the plaintiff and the defendants have requested summary judgment. Resolution of these motions requires a close review of the facts.[2]

The January 1974 Issue of *Aviation Medical Bulletin* carried an advertisement offering active airline pilots a special insurance policy.[3] One side of the page consisted of a picture caricaturing Father Time, replete with hourglass and sickle. The ad contained the following wording opposite the cartoon:

> TIME WAITS FOR NO MAN. NOT EVEN PILOTS. Just a year ago this old bird was a baby. And we hope he was good to you in '73.
>
> We also hope your financial circumstances are in good shape for '74. If they're not—if the time has slipped by and you're interested in additional coverage—get in touch with us. Now.
>
> We offer the Watt Plan-airline pilot occupational disability coverage from $25,000.00 to $75,000.00. It's coverage that pays the entire dividend in one tax-

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[1] Actually, the provision cited by the defendants is listed as a "condition." The policy contains a separate set of "exclusions." The defendants, nevertheless, would essentially have the paragraph act as an exclusion since they interpret it to limit their liability. For the purposes of this opinion, terms such as "condition," "exclusion," and "exclupatory clause" shall be used interchangeably.

[2] The plaintiff is a resident of Pennsylvania. National Fidelity and Aviation are respectively incorporated in Iowa and Georgia. Subject matter jurisdiction rests on diversity of citizenship. 28 U.S.C. §1332.

[3] *Aviation Medical Bulletin*, which is based in Atlanta, Georgia, is published by defendant Aviation.

> free, lump sum (after the specified waiting period) if you're permanently prevented from flying for your airline for medical reasons. (Of course, preexisting conditions are not covered).
>
> Here's another way you can keep up: If you're a new-hire, you can have our full coverage for half-price (a 50% reduction in your premiums) during your first two years with your airline.
>
> For more information, write to Harvey W. Watt, P. O. Box 20787, Atlanta Airport, Atlanta, Georgia 30320. Or call 767-7501. If you're outside Georgia, call toll free: (800) 241-6103. *Aviation Insurance Agency*

See Exhibit A attached to Document 19 of the Record. This advertisement apparently attracted Mr. Kerrigan's interest. In February 1974, he mailed a special reply card contained in the *Bulletin* which requested information on both the Disability Plan and a separate "Life Plan."[4] During the following June, the pilot forwarded Aviation the requisite forms for obtaining coverage, and the application was accepted.[5]

In December 1978, Mr. Kerrigan contracted stomach cancer. All parties to the litigation agree that the disease permanently precluded the insured from continuing in his

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[4] The defendants maintain that the "Life Plan" was a life insurance policy. The terms and nature of the plan, however, are not documented in the record. The significance of this Life Plan will be discussed in Part III of the Memorandum. *See* n.8, *infra* and accompanying text.

[5] The terms of the final agreement, signed on June 26, 1974, are appended to Document 1 of the Record.

position with Pan American.[6] He died on March 9, 1979. The Disability Plan issued by the defendants extended coverage to any insured "permanently prevented from carrying on his occupation as an airline pilot." *See* the attachment to Document 1 of the Record. The executor demands recovery on the grounds that the latter condition was fulfilled. The defendants, nevertheless, rely on a special provision in the Disability Plan. Condition 6 of the Agreement states the following:

> No claim shall be payable by reason of the death of the insured. In the event death occurs after the expiration of twelve months continuous and uninterrupted medical suspension from flight status, and after the medical referees have determined that disability exists, as provided in Conditions 1, 3, and 4 above, any payment due under this policy shall be made to the estate of the Insured.

National Fidelity and Aviation contend that this clause totally absolves them from liability.

In the view of the defendants, the sixth condition dispels the idea that the Disability Plan was in any way a life insurance policy. The language states that "[n]o claim shall be payable by reason of the death of the Insured." On this basis, the insurance companies argue that the paragraph excluded coverage for the misfortune that befell Mr. Kerrigan. National Fidelity and Aviation also maintain that the provision limits protection to instances in which the insured suffers from a "disability lasting twelve months." *See* Document 17 of the Record

[6] The defendants' Answer, Documents 5 of the Record, admits the allegations contained in Paragraph 6 of the Complaint. The latter paragraph contains the allegation of permanent disability.

at 2. The decedent's incapacitation did not last a year, because he died four months after the onset of his cancer. Therefore, the companies conclude that they are under no obligation to grant the Kerrigan estate a recovery on the policy.

Counsel for the executor has challenged the insurance companies' position on the ground that Condition 6 does not clearly create a prerequisite that the insured survive the beginning of his or her disability by a year. The plaintiff claims that the provision is ambiguous and thus should be construed against the defendants. The court, moreover, has directed the parties to provide argument on whether or not the circumstances of the case permit the companies to assert Condition 6 as a defense without independent evidence that the terms of the exclusion were orally explained to Mr. Kerrigan. Both questions are now ready for disposition. The plaintiff shall be granted summary judgment.

II. ALLEGED AMBIGUITY

Without a doubt, all unclear statements contained in an insurance policy must be construed against the insurer. *Central Dauphin School District v. American Casualty Company,* Pa. Super. Ct. , 412 A.2d 892, 894 (1979). Pennsylvania law is somewhat vague as to the exact standards for determining what constitutes an ambiguity. *See Oliver B. Cannon, Inc. v. Fidelity & Casualty Company,* 484 F. Supp. 1375, 1384-85 n.35 (D. Del. 1980). The overall test appears to be whether or not the language in question is capable of "two or more possible meanings." *Brokers Title Company v. St. Paul Fire & Marine Insurance Company,* 610 F.2d 1174, 1178 (3d Cir. 1979).

Judged by this standard, Condition 6 cannot be viewed as ambiguous. The provision clearly states that, by itself, the death of the insured will not qualify for protection under the policy. On the contrary, only a disability that completely prevents a pilot from carrying on his occupation will trigger coverage. It is true that Mr. Kerrigan suffered from such a problem. Nevertheless, the policy also states that payment to the estate of a deceased person will not occur until "after the expiration of twelve months continuous and uninterrupted medical suspension from flight status." Only one logical interpretation of this passage exists, *i.e.*, that the insured must survive the onset of the disability for a year. Any other construction would torture the meaning of the relevant language in contravention of the law of the Commonwealth. *Treasure Craft Jewelers v. Jefferson Insurance Company*, 583 F.2d 650, 652 (3d Cir. 1978).

This reading of the policy, however, does not compel a ruling in favor of the defendants. Indeed, the Pennsylvania Supreme Court has held that in certain circumstances even the clearest of exculpatory clauses must be set aside. This conclusion rests on the conviction that traditional concepts of contract law are not the proper framework for analyzing insurance transactions in which the insured does not share relatively equal bargaining power with the insurer. As the late Justice Manderino stated in *Collister v. Nationwide Insurance Company*, 479 Pa. 579, 593 (1978), *cert. denied*, 439 U.S. 1089 (1979):

> Because the insurer is in the business of writing insurance agreements, the recent trend in insurance cases has been away from strict contractual approaches towards a view that insurance policies (and

> other insurance contracts) are no longer private contracts in the traditional sense (if they ever were). The traditional contractual approach fails to consider the true nature of the relationship between the insurer and its insureds. Only through the recognition that insurance contracts are not freely negotiated agreements entered into by parties of equal status; only by acknowledging that the conditions of an insurance contract are for the most part dictated by the insurance companies and that the insured cannot "bargain" over anything more than the monetary amount of coverage purchased, does our analysis approach the realities of an insurance transaction. [citation omitted]

See also Brakemen v. Potomac Insurance Company, 472 Pa. 66, 76 (1977); *Central Dauphin School District v. American Casualty Company*, 412 A.2d at 894 n.3.

In view of this situation, the courts of Pennsylvania have devised several special rules designed to protect insurance consumers in given circumstances. One of these doctrines is the *Hionis* principle, which creates an affirmative duty on the part of an insurer to explain the terms of any exclusions in the scope of coverage. As shall be explained, failure to adhere to this duty can deny a company the right to rely on an exculpatory clause.

III. DUTY TO EXPLAIN TERMS OF THE EXCLUSION

Pennsylvania law requires that an insurer "ordinarily" may not rely on an exclusionary clause as a defense to liability unless it can be established that (1) the effect

of the exemption was explained to the purchaser *and* (2) the insured understood the terms of the provision. *Weiss v. CNA*, 468 F. Supp. 1291, 1293 (W.D. Pa. 1979). This rule, of course, places a significant burden on insurance companies. In the instant case, the defendants implicitly admit that they never gave Mr. Kerrigan an oral description or other special interpretation of Condition 6.[7] Rather, the insurers contend that the duty to explain does not apply under the facts of the suit. Determination of the issue demands a careful analysis of the relevant case law.

The genesis of the disclosure doctrine dates to the decision in *Hionis v. Northern Mutual Insurance Company*, 230 Pa. Super. Ct. 511 (1974). In that case, the plaintiff sued to force an insurance company to pay for the damage caused by a fire that destroyed his restaurant. The defendant argued that a certain clause in the policy substantially reduced its liability by establishing a special calculation for injury to designated improvements of the

[7] In a Memorandum and Order dated April 16, 1980, the court directed each party to state if: (1) the *Hionis* rule applied to the instant case and (2) *if so*, whether there was any evidence that the defendants had complied with its requirements. *See* Document 18 of the Record. In their reply brief, Document 19 of the Record, National Fidelity and Aviation devoted their entire argument to the first question and failed to submit any contentions with regard to the second. The companies, moreover, documented the history of the transaction and indicated that the entire matter was conducted by mail without maintenance of the *Hionis* requirements.

The defendants have had a full opportunity to present proof of compliance with *Hionis*. They have not done so. Indeed, all of the evidence before the court points to a contrary conclusion. Under the circumstances of the case, it is concluded that the companies have conceded non-compliance with the doctrine.

property. The insured attacked the validity of the calculation. Actually, the holding rendered in *Hionis* was narrow. The majority noted that the terms of the clause in question were very ambiguous. The record demonstrated that the insured had placed "full trust" in the defendant's agent, a personal acquaintance, to obtain adequate coverage. Furthermore, the insurance company offered no evidence that the purchaser was aware of the provision. Under these circumstances, the Superior Court ruled that the clause must be interpreted against the insurer and, thus, construed not to reduce the defendant's duty to pay. *Id.* at 517-18. Yet the true importance of *Hionis* springs from the following passage:

> When a defense is based on an exception or exclusion in a policy, our Supreme Court has held that such a defense is an affirmative one, and the burden is upon the defendant to establish it. *Even where a policy is written in unambiguous terms, the burden of establishing the applicability of the exclusion or limitation involves proof that the insured was aware of the exclusion or limitation and that the effect thereof was explained to him.* [footnote omitted, emphasis added]

Id. at 517. Our Court of Appeals has accepted this statement as an authoritative explanation of Pennsylvania law. *Daburlos v. Commercial Insurance Company of Newark,* 521 F.2d 18, 24-25 (3d Cir. 1975).

Subsequent rulings have recognized two exceptions to the *Hionis* principle. The first exists in situations involving equal bargaining power between the insured and the insurer. *Brokers Title Company v. St. Paul Fire &*

Marine Insurance Company, 610 F.2d at 1179-81 concerned a policy extending coverage to a "relatively large title insurance company." One of the exclusionary conditions contained in the contract would have absolved the insurer. Citing *Hionis*, the district court found for the title company on the grounds that the record contained no evidence that the terms of the exclusion had been explained to the purchaser's agent or that the agent had understood the provisions. The Court of Appeals reversed. On behalf of the majority, Judge Aldisert stated that *Hionis* is limited to instances in which the parties lack equal bargaining power and the policy consisted of terms dictated by the stronger. In such situations, the arrangement amounts to an "adhesion contract" and the insured merits special protection. When, however, the record demonstrates that the insurance company and the purchaser stood on comparable footing and were able to negotiate the relevant terms fairly, the *Hionis* rule does not apply. The Court of Appeals found that the title company was in a position to propose more favorable terms and bargain for them. Therefore, the *Hionis* protections were not appropriate.

National Fidelity and Aviation cannot find comfort in the *Brokers Title* decision. The opinion clearly leaves *Hionis* intact when the policy in question constitutes an adhesion contract. Judge Aldisert defined the latter term thusly:

> . . . Adhesion contracts are not the product of bargaining between the parties but are no more than an offer by one party to the other on a 'take it or leave it' basis. Contract formation under such circumstances is an experience 'not . . . of haggle or

> cooperative process, but rather of a fly and flypaper.' The offeree finds himself virtually compelled by economic necessity to accept a contractual term that he actively opposes, or would actively oppose if he thought opposition not futile. [Footnote omitted.]

Brokers Title Company v. St. Paul Fire & Marine Insurance Company, 610 F.2d at 1179. Judged by this standard, the *Brokers Title* exemption is not applicable.

The record shows that Mr. Kerrigan had no opportunity to negotiate the terms offered by the Disability Plan. His request for information was sent by mail. The conditions of the policy were contained on a printed form provided by the company. The defendants have never suggested that Mr. Kerrigan had an opportunity to offer counter-proposals to any of the provisions. In short, the Disability Plan consisted of terms presented to the purchaser on a "take it or leave it" basis. Mr. Kerrigan had no choice but to accept Condition 6 or forego the coverage offered by the defendants. Such an arrangement is, by definition, and adhesion contract. *Id.* at 1179-80; *Daburlos v. Commercial Insurance Company of Newark*, 521 F.2d at 26; *Hionis v. National Mutual Insurance Company*, 230 Pa. Super. Ct. at 516. The *Hionis* principle, therefore, cannot be affected by application of *Brokers Title*.

A second exception concerns instances in which the facts demonstrate that the insured clearly understood the terms of the exclusion independent of any explanation offered by the insurer. The most notable precedent in this area is *Miller v. The Prudential Insurance Company of America*, 239 Pa. Super. Ct. 467 (1976). The latter litigation concerned a "major medical" policy designed to

pay for expenses in excess of those covered by ordinary insurance. As would be expected in such a situation, the plan excluded liability for expenses already covered by Blue Cross and Blue Shield. The plaintiff-insured attempted to overturn the latter exception. A substantial portion of his medical costs had been underwritten by Blue Cross and Blue Shield. Quite naturally, the insurance company contended that it bore no responsibility with regard to these costs. The insured, however, argued that the exculpatory clause was invalid unless the defendant could demonstrate that the elements of *Hionis* had been satisfied. The Superior Court unanimously disagreed with the plaintiff.

Miller distinguished *Hionis* on several grounds. Primarily, the court noted that the very nature of the policy in question was such that the only reason to purchase the protection "must" have been to extend, not duplicate, the coverage offered by other types of insurance. 239 Pa. Super. Ct. at 473. The insured, therefore, had reason to know that the benefits of the plan he purchased were mutually exclusive from those offered by Blue Cross and Blue Shield. Furthermore, the *Miller* opinion was impressed by the fact that the application for the policy and the terms of the coverage unambiguously informed the purchaser of the exemption. Taken together, these two factors rendered "inequitable" the double recovery that the plaintiff would enjoy through disallowance of the exculpatory clause. *Id.* at 473-74. For this reason, the Superior Court affirmed the judgment in favor of the insurance company.[8]

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[8] For a case following the *Miller* rationale, *see Weiss v. CNA*, 468 F. Supp. at 1291-94.

The Court of Appeals for the Third Circuit has had occasion to apply the *Miller* holding. In *Treasure Craft Jewelers v. Jefferson Insurance Company*, 583 F.2d at 653-54, the plaintiff had purchased liability insurance for its business operation in Levittown. Subsequently, thieves burglarized the insured's store located in Southampton. The plaintiff sought recovery for the loss from the insurer on the theory that the provision limiting the defendant's responsibility to the Levittown site was invalid under the *Hionis* doctrine. The Court of Appeals, nevertheless, ruled for the insurance company. An analysis of the majority opinion, authored by Judge Hunter, demonstrates that the two essential ingredients for implementation of the *Miller* precedent were present. First, the application and policy terms in *Treasure Craft* clearly set forth the nature of the exemption. *Id.* at 654. Second, the facts of the case were such that the insured had reason to expect such an exemption regardless of the wording contained in the policy.[9] *Id.* at 653-54. Accordingly, the majority decided that, under *Miller*, the plaintiff "as a matter of law . . . must be held to have known of the limitation in the policy." *Id.* at 654.

The preceding authorities establish that two factors must be present before the second exception to *Hionis*

[9]As the majority explained, the Southampton operation had not even been in existence at the time that the plaintiff purchased the coverage. The defendant had had no opportunity to assess risks at the situs and decide if protection should be extended. On this basis, the insured should have expected that the Southampton premises were not covered. During the finalization of the agreement, moreover, the plaintiff made statements indicating that it understood the limitations involved in the arrangement. Treasure Craft Jewelers v. Jefferson Insurance Company, 583 F.2d at 654.

can affect the instant litigation. Initially, the terms and structure of the policy must clearly explain the liability exclusion on which the insurance companies intend to rely. In addition, there must be evidence that the insured had notice of the exemption from some source of information outside the policy. If the defendants can establish both of these prerequisites, then an understanding of the exculpatory provision will be imputed to the decedent. *Treasure Craft Jewelers v. Jefferson Insurance Company*, 583 F.2d at 653-54. Conversely, absence of either component will require application of *Hionis*. For reasons explained in Part II of this Memorandum, the court has concluded that the exemption cited by National Fidelity and Aviation was not ambiguous. Yet *Hionis* must still be followed, because the record contains no support for the conclusion that Mr. Kerrigan had an independent reason to know of the exception.

The defendants rely on the fact that the deceased purchased life insurance at the same time he enrolled in the Disability Plan.[10] This development allegedly renders the instant case analogous to *Miller*. According to the companies, the pilot clearly realized the difference between his disability and life insurance policies and, therefor, had notice of the fact that under the circumstances of his death, he would qualify for the latter coverage but not the former. On this basis, the defendants suggest that Mr. Kerrigan had the independent source of knowledge necessary to satisfy the *Miller-Treasure Craft* test. This argument is not persuasive.

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[10] As previously explained, the details of the Life Plan are unclear. The plaintiff, nonetheless, has not denied the existence of such a life insurance policy and, for the purpose of resolving the instant motion, its existence shall be assumed.

The insurance policies involved in *Miller* were mutually exclusive. As the Superior Court noted, the only purpose for purchasing "major medical" coverage was to guard against expenses not covered by ordinary health insurance, such as Blue Cross and Blue Shield. For this reason, the insured "must" have known that, by its nature, the plan at issue would not reimburse him for expenses guaranteed by other carriers. 239 Pa. Super. Ct. at 473. Yet the situation is quite different in the present case. The benefits offered by life insurance and the Disability Plan are not such that the insured can only qualify for one type.[11] Thus, it cannot be concluded that Mr. Kerrigan "must" have realized that the exclusion in question existed. The facts do not establish that the decedent had the independent source of knowledge necessary to trigger the *Miller-Treasure Craft* exception.

As previously explained, this court is bound to follow *Hionis*. The defendants have never contended that the requirements of that doctrine were fulfilled. The recognized exceptions to the principle, moreover, do not apply. The court, therefore, concludes that the exculpatory clause cited by the insurance companies cannot be given effect and the plaintiff must be awarded summary judgment.

(s) WILLIAM J. NEALON
Chief Judge, Middle District of Pennsylvania

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[11] There appears to be no question that National Fidelity and Aviation would have paid the decedent's estate under both policies had the deceased survived the onset of the cancer by a full year.

ORDER

Now, this 2nd day of October 1980, the following are ordered:

1) the motion for summary judgment of the plaintiff is granted;

2) and the motion for summary judgment of the defendants is denied.

(s) WILLIAM J. NEALON
Chief Judge, Middle District of Pennsylvania

Dated: October 2nd, 1980

Order, October 9, 1980

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 79-0902 Civil

ROGER MATTES, Executor of the Estate of Vincent M. Kerrigan,

Plaintiff

v.

NATIONAL FIDELITY LIFE INSURANCE COMPANY and AVIATION INSURANCE AGENCY, INC.

Defendants

ORDER

Now, this 9th day of October 1980, the Clerk of Court is directed to enter judgment in favor of the plaintiff for $75,000.00 with interest at the rate set by Pennsylvania statutory law from January 1, 1980.

(s) WILLIAM J. NEALON
Chief Judge, Middle District of Pennsylvania

Judgment

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 79-902

ROGER MATTES, Executor of the Estate of Vincent M. Kerrigan,

Plaintiff

v.

NATIONAL FIDELITY LIFE INSURANCE COMPANY AND AVIATION INSURANCE AGENCY, INC.

Defendants

(Filed Scranton, Pa., Oct 9 1980 Donald R. Berry, Clerk Per M. E. P. *Deputy Clerk*)

JUDGMENT

PURSUANT TO ORDER OF COURT DATED OCTOBER 9, 1980,

It is Ordered and Adjudged that judgment be and hereby is entered in favor of the Plaintiff and against the Defendants in the sum of $75,000.00 with interest at the rate set by Pennsylvania Statutory Law, from January 1, 1980.

Dated at Scranton, Pennsylvania this 9th day of October, 1980.

(s) DONALD R. BERRY,
DONALD R. BERRY, *Clerk of Court*

BY: (s) MARY E. PAMELIA,
MARY E. PAMELIA, *Chief Deputy*

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-2689

MATTES, Roger, Executor of the Estate of KERRIGAN, Vincent M.

Appellee

v.

NATIONAL FIDELITY LIFE INSURANCE COMPANY and AVIATION INSURANCE AGENCY, INC.,

Appellants

Appeal From the United States District Court for the Middle District of Pennsylvania D.C. Civil Action No. 79-00902

Argued April 21, 1981

Before: HUNTER, SLOVITER, *Circuit Judges*, and STAPLETON,* *District Judge*

---

* Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation.

Judgment Order, Court of Appeals

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

(s) JAMES HUNTER, III,
JAMES HUNTER, III, *Circuit Judge*

Attest:

(s) SALLY MRVOS
SALLY MRVOS, *Clerk*

Dated: May 20 1981

Opposition

Office - Supreme Court, U.S.
FILED
SEP 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL FIDELITY LIFE INSURANCE COMPANY and AVIATION INSURANCE AGENCY, INC.,

Petitioners,

vs.

ROGER MATTES, Executor of the Estate of VINCENT M. KERRIGAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Third Circuit's application of Pennsylvania's Hionis Rule is in conflict with any decisions of this Court.

Whether the Third Circuit's application of Pennsylvania Law is in conflict with decisions of other Federal Courts of Appeal on the same matter.

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SUMMARY OF ARGUMENT

I. Pennsylvania views most insurance policies as contracts of adhesion. It therefore closely scrutinizes and restricts exculpatory clauses which relieve insurers from liability under the policies. This rule of law does not conflict with any Supreme Court decisions.

II. Pennsylvania law was properly discerned and applied to the diversity case below. The law under the Erie Rule does not require a consensus of state law be reached and applied.

ARGUMENT

I. The Third Circuit's application of Pennsylvania's *Hionis* Rule is not in conflict with any decisions of this Court.

The Petitioner has argued that the Third Circuit's application of the so-called "*Hionis* Rule" is in conflict with applicable decisions of this Court. A review of both will show this is not the case.

The "*Hionis* Rule" is born of Pennsylvania's experience. That experience showed insurance consumers and insurance companies do not share equal bargaining power in the formation of insurance policies, therefore, Pennsylvania law does not apply the traditional concepts of caveat emptor in contract law.

As the late Justice Manderino stated in *Collister v. Nationwide Insurance Company*, 479 Pa. 579, 593 (1978), *cert. denied*, 439 U.S. 1089 (1979):

> Because the insurer is in the business of writing insurance agreements, the recent trend in insurance cases has been away from strict contractual approaches towards a view that insurance policies (and other insurance contracts) are no longer private contracts in the traditional sense (if they ever were). The traditional contractual approach fails to consider the true nature of the relationship between the insurer and its insureds. Only through the recognition that insurance contracts are not freely negotiated agreements entered into by parties of equal status; only by acknowledging that the conditions of an insurance contract are for the most part dictated by the insurance companies and that the insured cannot "bargain" over anything more than the monetary amount of coverage purchased, does our analysis approach the realities of an insurance transaction. [citation omitted]

See also *Brakemen v. Potomac Insurance Company*, 472 Pa. 66, 76 (1977); *Central Dauphin School District v. American Casualty Company*, 412 A.2d at 894 n.3.

In view of this situation, the courts of Pennsylvania have devised several special rules designed to protect insurance consumers in given circumstances.

The Pennsylvania Supreme Court has held that:

> "When a defense is based on an exception or exclusion in a policy, . . . such a defense is an affirmative one, and the burden is on the defendant to establish it. *Weissman v. Prashker*, 405 Pa. 226, 233, 175 A.2d 63 (1961).

This principle was expanded by the *Hionis* Doctrine where Judge Hoffman after quoting *Weissman v. Prashker* stated:

> "Even where a policy is written in unambiguous terms, the burden of establishing the applicability of an exclusion or limitation involves proof that the insured was aware of the exclusion or limitation and that effect thereof was explained to him." *Hionis v. Northern Mutual Insurance Co., et al.* 230 Pa. Superior Ct. 511, 517 (1974). See *Weissman v. Prashker*, 405 Pa. 226, 223, 175 A.2d 63 (1961); *Frisch v. State Farm Fire and Casualty Co.*, 218 Pa. Superior Ct. 211, 275 A.2d 849 (1971); *Purdy v. Commercial Union Insurance Co. of New York*, 50 Pa. D.&C. 2d 230, 235 (1970).

The *Hionis* Principle creates an affirmative duty on the part of an insurer to explain the terms of any exclusions in the scope of coverage. Failure to adhere to this duty can deny a company the right to rely on an exculpatory clause.

In *Purdy v. Commercial Union Insurance Company* cited by Judge Hoffman in *Hionis, supra*, Judge Silvestri wrote:

> "(A)n exclusion to comprehensive coverage . . . is not to be enforced, even though in unambiguous terms, unless it be proved that the insured was aware of the exclusion, and that the effect of the exclusion was explained to him. The insured's intention in entering into such a contract must be proved, and the burden of proof is on the insurer . . . We do not intend to treat the individual plaintiff differently from the larger corporate plaintiff. The burden of proof, in either event, is on the party asserting the exclusion to prove not only its applicability but its understanding by the party against whom the exclusion is sought." *Purdy v. Commercial Union Insurance Co. of N.Y.* 50 D.&C.2d 230, 235 (1970).

Most doubts as to whether the *Hionis* case properly stated Pennsylvania law, were removed by the Third Circuit in *Daburlos v. Commercial Insurance Company of Newark, New Jersey*, 521 F.2d 18 (3d Cir. 1975):

> "Pennsylvania (is) a jurisdiction which treats the insured with great liberality . . . Recently, the Pennsylvania Superior Court had occasion to comment on the (insurer's) burden of proof in *Hionis v. Northern Mutual Insurance Company*, 230 Pa. Super. 511, 516-17, 327 A.2d 363, 365 (1974).

The *Daburlos* decision involved the sale of airline trip insurance policies which contained clauses excluding coverage to side trips. The court found that under Pennsylvania law the insurance company had the burden of establishing that the purchasers (Daburlos) were aware of the exclusion presented by the clause and that its effects were explained to them. The court went on to say that the failure to provide such proof was sufficient to allow coverage. *Daburlos, supra*, 25.

The *Hionis* Doctrine was cited and followed in *Klischer v. Nationwide Life Insurance Co.*, 4 D.&C.3d 486 (1978 Columbia) where an airline pilot had a basic life insurance policy of $10,000 which provided additional benefits of $10,000 for accidental deaths. The third paragraph of the policy stated: "the following is a risk not assumed . . . travel or flight in any species of aircraft if an insured has any duties relating to such aircraft." The insured was killed while piloting an aircraft, and the insurer refused to pay the accidental death benefits relying on the above exclusion. The court held that the defendants failed to prove that the insured was aware of and understood the implications of, the aviation exclusion in the accidental death insurance. Even though the language was written in unambiguous terms, that failure precluded the insurer of escaping liability. *Klischer, supra.* 488.

Several other Pennsylvania cases cite *Hionis* for the principle that even where exculpatory provision is clear and unambiguous, the insurers have the burden of establishing the insured is aware of the exclusion and its effect on him. Without such proof, the exculpatory clause cannot release the insurers of liability. See *Cohen v. Eric Indemnity Co.*, 14 D.&C.3d 444, 452 (1980 Philadelphia); *Buckrich v. Gibbs*, 1 D.&C.3d 610, 614 (1976 Mercer); *Bierly v. John Hancock Mutual Life Insurance Co.* 13 D.&C.3d 40, 45 (1979 Dauphin); *DeHaven v. Safeguard Insurance Co.* 71 D.&C.2d 429, 438 (1975 Monroe).

In *Oliver B. Cannon and Sons, Inc. v. Fidelity and Casualty Co. of New York*, 484 F. Supp. 1375 (1980) the United States District Court of Delaware cited with approval the "Pennsylvania law" as stated in the *Hionis* doctrine. *Cannon, supra.* 384.

Thus the *Hionis* rule is clearly the law of Pennsylvania.

The question remaining is where does this rule conflict with applicable decisions of this Court. It is submitted that there are no such conflicts.

The legal concept of "adhesion contracts" is relatively new. Its germination period has only taken place within the last twenty years; yet its utilization has spread rapidly.

The *Hionis* rule is based on the recognition that insurance policies are, in the majority of cases, contracts of adhesion.

Petitioner cites no cases where this Court rejected Pennsylvania's *Hionis* rule. Nor did it cite any case where this court struck down any law placing limitations on adhesion contracts.

The Supreme Court decisions that the Petition cited were handed down several years before the concept of adhesion contracts became widespread. Neither case discussed the issue. Moreover, the black-letter law for which they stand remain in place under *Hionis* absent disparagy in bargaining power.

Had Petitioner continued with circuit Judge Aldisert's quotation it would read ". . . Among the restrictions placed on freedom of K is the prohibition against so-called contracts of adhesion, under which the parties are not of equal bargaining power and weaker party, usually buyer, must adhere to terms of form contract if he wants to purchase goods or services at all." *Brokers Title Company Inc. v. St. Paul Fire & Marine Insurance Company*, 610 F.2d 1174, 1179 (3d Cir. 1979).

II. The Third Circuit's application of Pennsylvania Law to the diversity case below is not in conflict with decisions of other Federal Courts of Appeal on the same matter.

The Petitioner's claim that the decision below is in conflict with decisions of other Federal Courts of Appeal is without merit.

In this diversity action, the District Court was bound to apply Pennsylvania law under the rule of *Erie Railroad Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The District Court found the applicable state law contained in the Hionis rule (discussed in previous argument). That *Hionis*, as applied, is a true statement and application of Pennsylvania law is not an issue.

The Petitioner, however, seems to be under the mistaken impression that Pennsylvania law must be in conformity to the laws of all other states before the Third Circuit can apply it in this diversity case. Its brief quoted the laws of Nebraska, Ohio, Florida and Minnesota to show those states had laws differing from Pennsylvania's *Hionis* rule. Those states, however, have nothing to do with this case.

As the District Court was bound to discern and apply only Pennsylvania law, the laws of Nebraska, Ohio, Florida, Minnesota, and the other fifty-five states were not germane.

Supreme Court *Rule* 17.1.(a) provides the court will consider granting a review on writ of certiorari where a federal court of appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter.

This rule is understandable as there should be consistency of decisions on the same FEDERAL ISSUES that

are decided in the same frame. And the Supreme Court is the only court that can bring consistency among its circuits. (emphasis added) *Moores Federal Practice*, Second Edition, S.C. 17-20 §817.21.

This case, however, involved applying state law, not federal issues; thus consistency between circuits is not essential.

No conflicts between Federal Courts of Appeal have been stated in Petitioner's brief, as no Court of Appeal has been cited for discerning and applying Pennsylvania law differently than the Court below.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Certiorari be denied.

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